IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.2818 OF 2003

Air India Ltd. ..Petitioner.

Vs.

V.M. Mhadgut & anr. ..Respondents.

....

Mr. S.K. Talsania, Senior Advocate with Mr. M. Rehthan with Mr. Saluja i/b M/s. M.V. Kini & Co. for the Petitioner.
Mr. S.C. Naidu with Mr. Manoj Gujjar i/b Mr. C.R. Naidu for the respondents.

...

CORAM: DR. D.Y. CHANDRACHUD, J.

30th August, 2006.

ORAL JUDGMENT:

1. These proceedings arise out of an order of the Presiding Officer of the National Industrial Tribunal at Mumbai rejecting an application under Section 33(2)(b) of the Industrial Disputes Act, 1947.

2. The First Respondent was employed as a Loader in the Commercial Department of Air India on 27th April, 1983 and was confirmed in service with effect from 1st November, 1983. On 27th

November, 1986 the workman was arrested by the police at Sahar International Airport on the charge that he was involved in the commission of an offence punishable under Section 380 of the Penal Code. The allegation against the First Respondent was that he was involved in the theft of 868 integrated circuits from the Air India cargo warehouse. The First Respondent was charge sheeted for disciplinary proceedings on 20th February, 1990. The enquiry committee came to the conclusion on 7th October, 1991 that the charges leveled against the First Respondent stood established on the evidence on record and that the First Respondent was guilty of misconduct. The disciplinary authority by an order dated 3rd March, 1992 imposed the punishment of dismissal on the First Respondent. An industrial reference was at the material time pending before the National Industrial Tribunal at Mumbai being Reference NTB-1/ BOM of 1990. On 1st June, 1992 the management moved the Industrial Tribunal for the grant of approval under Section 33(2)(b) of the Industrial Disputes Act, 1947. The application for approval was contested by the workman. On 17th December, 1996, when the application came up for

hearing before the Tribunal, the management filed an application seeking permission to withdraw the application, reserving liberty to file a fresh application. The Presiding Officer of the Tribunal by his order of 17th December, 1996 directed that the application was allowed to be withdrawn reserving liberty to file a fresh application and subject to such reservations in regard to the rights and contentions of the parties which were kept open. On 11th March, 1997 the management reinstated the workman in service informing him at the same time that in pursuance of the liberty which was granted by the Tribunal the management was doing so subject to the filing of a fresh application for approval. On the next day, 12th March, 1997, the workman was placed on suspension. On 27th August, 1997, the management passed an order of dismissal against the workman on the finding that the charge of dishonesty in connection with the business of the corporation and of an act subversive of discipline stood proved under the charge sheet dated 20th February, 1990. The management forwarded to the workman his wages for one month and thereupon moved an application for approval before the National Industrial Tribunal at

Mumbai under Section 33(2)(b) since the industrial reference continued to remain pending in the meantime.

3. The Industrial Tribunal dismissed the application for approval under Section 33(2)(b) by its impugned order. The Tribunal held following the decision of the Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Shri Ram Gopal Sharma**[1] that the effect of the withdrawal of the first application was that it shall be deemed that no approval had been granted and the order of dismissal on the basis of which the application was filed had no effect in law. Consequently, the Tribunal held that the workman shall be deemed to be in service on 3rd March, 1992. The Tribunal was of the view that it was not open to the Tribunal to issue permission to the employer to file a fresh application upon the withdrawal of the earlier application. According to the Tribunal, the earlier order dated 17th December, 1996 was a nullity. Finally, the Tribunal held that the cause of action in respect of the first order of dismissal had merged in the judgment of the Tribunal dated 17th December, 1996. Hence, the only manner in which the

1 AIR 2002 SC 643.

management could have filed a fresh application was by conducting a fresh disciplinary enquiry. According to the Tribunal, the management was not justified in relying upon the earlier enquiry to sustain a fresh order of dismissal on the strength of which an approval application was filed on the second occasion. These are the reasons on the basis of which the approval application came to be dismissed.

4. On behalf of the Petitioner it has been urged that (i) on the earlier occasion the management suo motu realized that there was a deficiency in the approval application; in that there was a short fall in the payment of wages for a period of one month and realizing the deficiency the management withdrew the approval application seeking liberty to file a fresh application for approval under Section 33(2)(b); (ii) The consequence of the withdrawal of the first application was that the order of dismissal must be regarded as being void and inoperative; (iii) The management accepted the consequences and reinstated the workman in service; (iv) The reinstatement of the workman in service did not,

however, preclude the management from passing a fresh order of dismissal and seeking the approval of the Tribunal after complying with the requirements of the law; (v) The Tribunal was in error in coming to the conclusion that it was necessary for the management to hold a fresh or a de novo disciplinary enquiry and neither the judgment in **Jaipur Zila** nor the subsequent decisions warrant such an inference.

5. On behalf of the First Respondent reliance has been placed, besides the judgment in Jaipur Zila on the subsequent judgment of the Supreme Court in **Indian Telephone Industries Ltd. v. Prabhakar H. Manjare**[2]**.** The learned counsel submitted that the consequence of the withdrawal of the first application for approval was that the order of dismissal was rendered void and inoperative. Thereafter, it was the bounden duty of the management not merely to pass an order of reinstatement which was formal in nature but, in addition to pay the entire backwages to the workman from the date of the original order of dismissal. In the present case, the attention of the Court has been drawn to the fact

2 AIR 2003 SC 195.

that the management, while passing the purported order of reinstatement did not pay the workman his entire dues since the passing of the order of dismissal. In the circumstances, it was submitted that the fresh order of dismissal that was passed by the management was only notional in nature without complying with the necessary obligations cast upon the management. It must also be recorded that counsel appearing for the workman has fairly conceded before the Court that the observations of the Tribunal in paragraph 15 of the judgment to the effect that the management must now hold a fresh or de novo enquiry may not be reflective of the correct position in the law. The learned counsel submitted that this part of the observations of the Tribunal does not appear to reflect the correct position. At the same time it was submitted before the Court that in the event that the management intends to file another application for approval under Section 33(2)(b) it is necessary that the workman is paid the entire dues that have accrued in the meantime on the basis that the order of dismissal stood invalidated.

6. While considering the tenability of the aforesaid submissions, it will be necessary for this Court to advert to the provisions of Section 33(2)(b) and to the construction that has been placed thereon by the Constitution Bench of the Supreme Court in **Jaipur Zila.** Section 33(2)(b) postulates that during the pendency of a proceeding before the Labour Court or Tribunal in respect of an industrial dispute, the employer may in accordance with the standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, discharge or punish the workman whether by way of dismissal or otherwise for any misconduct not connected with the dispute. The proviso to Section 33(2) however, requires the observance of certain safeguards that are intended to protect the workman against victimization or unfair treatment. The proviso to Section 33(2) lays down as follows :

> "Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

7. Now it is a well settled principle of law that any action by the employer to discharge or punish a workman for misconduct in a situation that is covered by Section 33(2) has to be accompanied by observance of the safeguards that are stipulated in the proviso as part of one transaction. These safeguards are i) the payment of wages for one month to the workman; and (ii) an application by the employer to the authority before which the proceeding is pending for approval. The Constitution Bench of the Supreme Court in **Jaipur Zila** (supra) interpreted the provisions of Section 33 (2)(b) and held that the requirement stipulated in the proviso thereto is mandatory. This was the earlier view which was taken by two Benches of the Supreme Court in **Strawboard Manufacturing Co. v. Gobind**[3] and **Tata Iron & Steel Co. Ltd. v. S. N. Modak**[4]. A contrary view had been taken by another Bench of Three Learned Judges in **Punjab Beverages Pvt. Ltd. v. Suresh Chand**[5] where it was held that the failure to apply for approval under Section 33(2)(b) would only render the employer liable to

3 AIR 1962 SC 1500.
4 AIR 1966 SC 380.
5 AIR 1978 SC 995.

punishment under Section 31 and that the remedy of the employee was either by way of a complaint under Section 33A or a reference under Section 10. The Supreme Court held that the view in **Punjab Beverages** did not reflect the correct position in law. The earlier judgments in **Strawboard** and **Tata Iron & Steel Co**. were expressly affirmed. The Supreme Court held that the proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice. This protection, the Supreme Court held, was necessary when by the pendency of an industrial dispute, the relationships between the parties are liable to be strained. The Court held that in the event that an employer was permitted to pass orders of discharge or dismissal without complying with the requirement of the proviso, the employer may with impunity discharge or dismiss a workman. The principles which therefore emerge from the judgment of the Constitution Bench are as follows :

i) Compliance with the provisions contained in the proviso to Section 33(2)(b) is mandatory;

ii) An order of dismissal or discharge passed by the

employer by invoking Section 33(2)(b) brings to an end the relationship of employer and employee but, the order remains inchoate as it is subject to the approval of the authority under the provision;

iii) The relationship of employer and employee comes to an end de jure only when the authority grants approval;

iv) If approval is not granted nothing more is required to be done by the employee as it would then be deemed that the order of dismissal or discharge had never been passed;

v) A situation where no application has been filed by the employer stands on the same footing as when an application is withdrawn; and

vi) Not making an application under Section 33(2)(b) or withdrawing an application once made involves a clear contravention of Section 33(2)(b). In so far as the last proposition is concerned, it would be necessary to extract from paragraph 15 of the judgment of the Supreme Court which holds thus :

> "The view that when no application is made or the one made is withdrawn, there is no order of refusal of such

application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment."

8. At this stage, it would be now necessary to advert to the

facts of the present case. The management passed an order of dismissal against the workman on 3rd March, 1992 following the disciplinary proceedings. An application for withdrawal was filed before the National Industrial Tribunal on 1st June, 1992. On 17th December, 1996 the management filed an application before the Industrial Tribunal expressly seeking permission to withdraw the application for approval with liberty to institute a fresh application. Whether such a liberty could be granted would be dealt with a little later. At the present stage, it would be necessary to observe that the plain consequence of the withdrawal of the application under Section 33(2)(b) was as if no approval application was instituted in the first instance. This is the clear consequence which flows out of the observations of the Supreme Court in paragraph 15 of the decision in **Jaipur Zila.** The net result then was that the original order of dismissal was rendered void and inoperative. The relationship of employer and employee had remained inchoate between the passing of the order of dismissal and the order of the Tribunal dated 17th December, 1996. But, in any event it is now evident that upon the withdrawal of the application, it was as if the

order of dismissal was rendered void and inoperative with the result that there was no cessation de jure of the relationship of employer and employee. The workman was therefore entitled to continue in service and to the payment of his wages in accordance with law. The management however acting in pursuance of the liberty which was granted by the Tribunal sought to dismiss the workman once again from service after reinstating him on 11th March, 1997. The grant of liberty by the Tribunal is, to my mind, a subsidiary event because the basic question that has to be addressed is as to whether the management was entitled to pass an order of dismissal again after the earlier order of dismissal was rendered void and inoperative.

9. This question came to be addressed by the Supreme Court initially in the judgment in **Tata Iron & Steel Co. Ltd. v. S. N. Modak** (supra). The judgment in **Tata Iron & Steel** dealt with a situation where an application for approval under Section 33(2)(b) was filed during the pendency of a reference. However, the reference came to be concluded during the pendency of the

approval application. The Supreme Court dealt with the submission that upon the conclusion of the reference, the approval application itself was required to be disposed of. The Supreme Court held that strictly speaking an application under Section 33(2)(b) could in a sense be treated as an incidental proceeding but, it was a separate proceeding all the same and in that sense it would be governed by the provisions of Section 33(2)(b) as an independent proceeding. Hence, the Court held that an application under Section 33(2)(b) was not an interlocutory proceeding properly so called in its full sense and significance. The Supreme Court held that with the final determination of the main dispute between the parties, the employers' right to terminate the services of the workman revives and the ban imposed on the exercise of the power was lifted. But, for the period between the date on which the management had passed its order in question against the workman and the date when the ban was lifted by the final determination of the main dispute, the order could not be valid unless it received the approval of the Tribunal. In that context, the Supreme Court held thus :

> "…. even if the main industrial dispute is finally decided, the question about the validity of the order would still have to be tried and if the approval is not accorded by the Tribunal, the employer would be bound to treat the respondent as its employee and pay him his full wages for the period even though the appellant may subsequently proceed to terminate the respondent' s services. Therefore, the argument that the proceedings if continued beyond the date of the final decision of the main industrial dispute would become futile and meaningless, cannot be accepted."

These observations of the Supreme Court were pressed in aid on behalf of the management in a subsequent decision. That decision in **Indian Telephone Industries Ltd. v. Prabhakar H. Manjare** (supra) arose after the judgment of the Constitution Bench in **Jaipur Zila**. In the judgment in the **Indian Telephone Industries** case, an application for approval for the discharge of the workmen was moved before the Industrial Tribunal under Section 33(2)(b) since an industrial dispute was already pending. The Tribunal held that the orders of dismissal were invalid for non-compliance with the provisions of Section 33(2)(b) since the wages for one month were not paid. These orders of the Tribunal remained unchallenged. The management treating non-compliance with

Section 33(2)(b) as a mere technical breach passed orders of dismissal for the second time without a fresh enquiry. No wages were paid to the workmen for the period between the date of the first order of dismissal and the second order. The management again moved applications seeking approval of the Industrial Tribunal under Section 33(2)(b). The Tribunal relying upon the judgment of the Supreme Court in **Punjab Beverages** allowed the applications. The workmen moved the Karnataka High Court. A learned Single Judge affirmed the order of the Tribunal. But, the Division Bench in appeal set aside the order of the Single Judge and held that the workmen shall be deemed to be in continuous service together with all consequential benefits. In an appeal before the Supreme Court by the management, reliance was placed on the observations of the Supreme Court in **Tata Iron & Steel Co. Ltd.** which inter alia permitted the management to pass a fresh order of dismissal after paying full wages. The Supreme Court held that **Tata Iron**'s case essentially dealt with the question as to whether an approval application would survive after the disposal of the main industrial dispute in which it was filed.

Dealing with the facts of the case the Supreme Court held that the earlier judgment of the Tribunal rejecting the application for the grant of approval had attained finality and was not challenged any further. The workmen were not reinstated in service even thereafter. In the light of the judgment of the Constitution Bench in **Jaipur Zila**, the Supreme Court held that the order refusing to give approval for dismissal on the ground of non-compliance with the proviso to Section 33(2)(b) rendered it void and inoperative and the workmen were deemed to have continued in service as if no order of dismissal was passed. The Court emphasized that no wages were paid between the first order of dismissal and the second order. In the circumstances, it was held that it appeared that the management was attempting to defeat the claim of the Respondent workmen when the order on the first application had become final and no wages had been paid.

10. On behalf of the management, learned counsel, however, sought to submit that the present case stands on a different footing for two reasons, the first being that in the first

instance there was no determination by the Tribunal on the merits of the application for approval since the management had suo motu withdrawn the application with liberty to institute a fresh application. The second reason, it was submitted, was that the management had in the meantime reinstated the workman before proceeding to pass a fresh order of dismissal. Now in so far as the first of the reasons that have been advanced by the management is concerned, the withdrawal of the application in the first instance would not make any material distinction in so far as the consequence of the order of withdrawal is concerned. As the Supreme Court held in **Jaipur Zila,** the effect of the withdrawal of an application for approval is the same as a case where no application for withdrawal is made in the first instance. The consequence is that there is a breach of the requirement of the proviso to Section 33(2)(b). Thereupon, the order of dismissal is rendered void and inoperative and there is no cessation de jure of the relationship of employer and employee in the eyes of law. In so far as the second reason is concerned, it is undoubtedly true that in the present case the management reinstated the workman

on 11th March, 1997 after the earlier application for approval was withdrawn on 17th December, 1996. The reinstatement, however, has to be a genuine and valid reinstatement in the eyes of law. The judgment of the Supreme Court in **Indian Telephone Industries** emphasized that the management is not entitled to issue a fresh order of dismissal, consequent upon the invalidation of the earlier order without, in the meantime, reinstating the workman and paying full wages. The reason for this is clear. Upon invalidation of the order of dismissal for non-compliance with the proviso to Section 33(2)(b) the order of dismissal is rendered nonest and the workman is entitled to reinstatement with all consequential benefits. The management cannot in such a situation treat the breach of Section 33(2)(b) as only a procedural lapse and pass a fresh order of termination, by merely effectuating the requirement of one month's notice. Before the management can be permitted to do so, it must of necessity give full effect to the consequence in law of the setting aside of the order of dismissal. Full effect can be said to be given by the management only when the workman is reinstated in service together with the payment of

full backwages between the date of the first order of dismissal and the second order of dismissal.

11. The Tribunal has in the present case come to the conclusion that it is not open to the management, after the approval application was withdrawn to pass a fresh order of dismissal. The view of the Tribunal is that before the management does so, it must hold a fresh disciplinary enquiry. This view of the Tribunal is difficult to sustain. The consequence of a refusal of the approval application under Section 33(2)(b) is that the order of dismissal is void. Similarly, where the employer either fails to apply for approval under Section 33(2)(b) or withdraws an application once it was made, the same consequence would ensue viz. the invalidation of the order of dismissal. The invalidation of the order of dismissal, however, does not obliterate the underlying misconduct in the disciplinary proceeding. It is therefore not necessary for the employer to hold a fresh disciplinary enquiry before the workman can be proceeded again for the misconduct which forms the subject matter of the earlier enquiry. In the

present case, counsel appearing for the First Respondent has conceded to this position but, in my view, it is necessary to observe that the concession has been correctly made before the Court. In the circumstances it would be inappropriate to direct or expect that the management must hold a fresh disciplinary enquiry. That is not reflective of the correct position in law. That apart, the Court cannot be unmindful of the fact that over a lapse of time witnesses may not be available for deposing at a fresh disciplinary enquiry. The witnesses at the original enquiry may not be in service or be available for deposing. The object of Section 33(2)(b) is to prevent victimization of workmen or unfair labour practices during the pendency of a reference. The underlying misconduct is not effaced. In the circumstances, the observations of the Tribunal in paragraph 15 of the judgment are not reflective of the correct or proper position in law.

12. In so far as the facts of the present case are concerned, the workman in his affidavit dated 29th November, 2003 specifically averred in paragraphs 5 and 6 that the management had not paid

him his wages between the passing of the first order of dismissal and the second order of dismissal. A computation of wages due and payable upto 30th November, 2003 has been annexed and according to the workman an amount of Rs.10,26,879.31 is due and payable. No reply has been filed to the aforesaid affidavit of the workman, though the affidavit of the workman was filed nearly three years ago in this Court. That apart, it is apparent that the management was not unaware of its obligation to pay the entire backwages in the intervening period. In the synopsis appended to the Petition, the management has made the following statement, as a statement of fact:

> "1st Respondent was reinstated in the services by Office Memo dated 113.97 and 1st Respondent was also paid a sum of Rs..... on ..... being the back wages for the period from the date of dismissal i.e. 1.3.92 to till (sic) the date of reinstatement, i.e. 11.3.97."

The figures in regard to payment and the dates of alleged payment have been kept blank. Fairly the statement made on behalf of the Respondent that the payment of backwages between the date of the first order of dismissal and the second order has not been

made, has not been controverted. The workman was reinstated on 11th March, 1997. On 12th March, 1997, he was suspended, "with immediate effect". On 27th August, 1997, an order of dismissal was passed. No wages were paid between the date of the original order of termination (1st June, 1992) and the order of reinstatement.

13. On 28th February, 2002 the workman moved an application for interim relief before the Tribunal to which the company filed a reply stating that on 4th November, 1999, it had informed the workman that a cheque dated 29th October, 1999 was ready for payment of subsistence allowance between 11th March 1997 and 25th September, 1997. On 19th April, 2002, the management paid subsistence allowance of Rs.2,47,205/- for the period after 12th March, 1997. By an order dated 20th September, 2002, the Tribunal directed the management to pay subsistence allowance from 11th March, 1997 to 11th September, 2002 and subsistence allowance thereafter from 1st October, 2002 by the month. The management challenged the order again before this

Court. By a judgment and order dated 14th October, 2003 of a Learned Single Judge the order of the Tribunal for the payment of subsistence allowance during the pendency of the approval application was held to be unsustainable relying on a Division Bench judgment which held that the payment of subsistence allowance cannot ipso facto be ordered in all cases during the pendency of an approval application. The Tribunal had in the meantime, also disposed of the application for approval under Section 33(2)(b). The order of the Tribunal was thus set aside.

14. In these circumstances, it cannot be said that there was a valid or genuine compliance with the consequence that ensued in law upon the invalidation of the first order of dismissal. The wages for the period between the first order of dismissal and the second order of termination have admittedly not been paid. Therefore even assuming that the management was entitled to place the workman on suspension after the withdrawal of the application for approval, the plain consequence of the invalidation of the order of dismissal would follow. In order to constitute a

genuine and bona fide act of reinstatement, the payment of full wages was necessary. This was not done.

15. In the circumstances, the final order of the Tribunal dismissing the application of the management for the grant of approval under Section 33(2)(b) does not require interference under Article 226 of the Constitution. However, it is clarified that this shall not preclude the management from taking action in accordance with law after observing the conditions precedent under Section 33(2)(b) as clarified in the observations made in the earlier part of this judgment.

The Petition is accordingly disposed of.

There shall be no order as to costs.